

The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TAMIE JENSEN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

CAPITAL ONE FINANCIAL
CORPORATION,

Defendant.

CASE NO. 2:24-cv-00727-KKE

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the

1 application of the proportionality standard in discovery, requests for production of ESI and related
2 responses should be reasonably targeted, clear, and as specific as possible. This agreement is
3 intended to assist the parties in identifying relevant, responsive information that has been stored
4 electronically and is proportional to the needs of the case. The agreement does not supplant the
5 parties' obligations to comply with Fed. R. Civ. P. 34.

6 **B. ESI Disclosures**

7 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
8 party shall disclose:

9 1. Custodians. The custodians most likely to have discoverable ESI in their
10 possession, custody, or control. The custodians shall be identified by name, title, connection to
11 the instant litigation, and the type of the information under the custodian's control.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
13 drives, servers), if any, that, after a reasonably diligent investigation, a party believes likely to
14 contain discoverable ESI.

15 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
16 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
17 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
18 information stored in the third-party data source.

19 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
20 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
21 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

C. ESI Discovery Procedures

1. On-site inspection of electronic media. Such an inspection shall not be required absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search methodology. The parties shall timely confer to attempt to reach agreement on appropriate search terms and queries, file type and date restrictions, data sources (including custodians), and other appropriate computer- or technology-aided methodologies, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search methodology.

a. Prior to running searches:

i. The producing party shall disclose the data sources (including custodians), search terms and queries, any file type and date restrictions, and any other methodology that it proposes to use to locate ESI likely to contain responsive and discoverable information. The producing party may provide unique hit counts for each search query.

ii. The requesting party is entitled to, within 14 days of the producing party's disclosure, add no more than 10 search terms or queries to those disclosed by the producing party absent a showing of good cause or agreement of the parties..

iii. The following provisions apply to search terms / queries of the requesting party. Focused terms and queries should be employed; broad terms or queries, such as product and company names, generally should be avoided. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search

1 term unless they are variants of the same word. The producing party may identify each search
2 term or query returning overbroad results demonstrating the overbroad results and a counter
3 proposal correcting the overbroad search or query.

4 b. After production:

5 Within 21 days of the producing party notifying the receiving party that it has substantially
6 completed the production of documents responsive to a request, the responding party may request
7 no more than 10 additional search terms or queries. The immediately preceding section (Section
8 C(2)(a)(iii)) applies.

9
10 3. Format.

11 a. ESI will be produced to the requesting party with searchable text, in a
12 format to be decided between the parties. Acceptable formats include, but are not limited to, native
13 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only
14 with load files for e-discovery software that includes metadata fields identifying natural document
15 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

16 b. Unless otherwise agreed to by the parties, files that are not easily converted
17 to image format, such as spreadsheet, database, and drawing files, will be produced in native
18 format.

19 c. Each document image file shall be named with a unique number (Bates
20 Number). File names should not be more than twenty characters long or contain spaces. When a
21 text-searchable image file is produced, the producing party must preserve the integrity of the
22 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
23 the revision history.

1 d. If a document is more than one page, the unitization of the document and
2 any attachments and/or affixed notes shall be maintained as they existed in the original document.

3 e. The parties shall produce their information in the following format: single-
4 page images and associated multi-page text files containing extracted text or with appropriate
5 software load files containing all information required by the litigation support system used by
6 the receiving party.

7 f. The full text of each electronic document shall be extracted (“Extracted
8 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
9 format (or Unicode text format if the text is in a foreign language) and shall be named with a
10 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
11 production version of the document followed by its file extension).

12 g. To the extent possible, documents other than email will be produced in the
13 color and quality they are maintained in the ordinary course of business.

14 4. De-duplication. The parties may de-duplicate their ESI production across custodial
15 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
16 information removed during the de-duplication process tracked in a duplicate/other custodian
17 field in the database load file.

18 5. Email Threading. The parties may use analytics technology to identify email
19 threads and need only produce the unique most inclusive copy and related family members and
20 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
21 a less inclusive copy.

22 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
23 the following metadata fields need be produced, and only to the extent it is reasonably accessible
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1 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
2 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
3 file extension; original file path; date and time created, sent, modified and/or received; and hash
4 value. The list of metadata type is intended to be flexible and may be changed by agreement of
5 the parties, particularly in light of advances and changes in technology, vendor, and business
6 practices.

7 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
8 electronic format, the production of hard-copy documents will include a cross-reference file that
9 indicates document breaks and sets forth the custodian or custodian/location associated with each
10 produced document. Hard-copy documents will be scanned using Optical Character Recognition
11 technology and searchable ASCII text files will be produced (or Unicode text format if the text is
12 in a foreign language), unless the producing party can show that the cost would outweigh the
13 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning
14 and will not result in accurate or reasonably useable/searchable ESI). Each file will be named
15 with a unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
16 production version of the document followed by its file extension).

17 **D. Preservation of ESI**

18 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
19 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
20 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
21 as follows:

22 1. Absent a showing of good cause by the requesting party, the parties shall not be
23 required to modify the procedures used by them in the ordinary course of business to back-up and
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1 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
2 possession, custody, or control.

3 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
4 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
5 where that data is created after a disclosure or response is made (unless excluded under Sections
6 (D)(3) or (E)(1)-(2)).

7 3. Absent a showing of good cause by the requesting party, the following categories
8 of ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral data
11 that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache,
13 cookies, and the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as
15 last-opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are duplicative of data that are more accessible
17 elsewhere.
- 18 f. Server, system or network logs.
- 19 g. Data remaining from systems no longer in use that is unintelligible on the
20 systems in use.
- 21 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
22 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
23 a copy of all such electronic data is automatically saved in real time
24 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
25 storage) to the extent such back-up locations are within the possession,
26 custody, or control of the parties.

22 **E. Privilege**

23 1. A producing party shall create a privilege log of all documents fully withheld from
24 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this

1 Agreement and Order. Privilege logs shall include a unique identification number for each
2 document and the basis for the claim (attorney-client privileged, work-product protection, bank
3 examination privilege or bank secrecy act). For ESI, the privilege log may be generated using
4 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title;
5 and date created. Should the available metadata provide insufficient information for the purpose
6 of evaluating the privilege claim asserted, the producing party shall include such additional
7 information as required by the Federal Rules of Civil Procedure. Privilege logs will be produced
8 to all other parties no later than 30 days before the deadline for substantial completion of pre-
9 certification document discovery unless another deadline is agreed to by the parties.

10 2. Redactions need not be logged so long as the basis for the redaction is clear on the
11 redacted document.

12 3. With respect to privileged or work-product information either as part of litigation
13 counsel's pre-filing investigation into the named plaintiffs' claims, or after the filing of the
14 complaint, parties are not required to include any such information in privilege logs.

15 4. Activities undertaken in compliance with the duty to preserve information are
16 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

17 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically
18 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding
19 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute
20 a waiver by the producing party of any privilege applicable to those documents, including the
21 attorney-client privilege, attorney work-product protection, or any other privilege or protection
22 recognized by law. This Order shall be interpreted to provide the maximum protection allowed
23 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained
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herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party.

DATED: April 11, 2025

/s/ Jonas Jacobson

Dovel & Luner, LLP
Attorneys for Plaintiff

DATED: April 11, 2025

/s/Aaron Brecher

ORRICK, HERRINGTON & SUTCLIFFE
LLP

Attorneys for Defendant

ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: April 14, 2025.



Kymberly K. Evanson
United States District Judge